

**DISCLAIMER**

*This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).*

**COMMONWEALTH OF VIRGINIA, ex rel.  
STATE CORPORATION COMMISSION**

**v.**

**CASE NO. INS990263**

**ADVANTAGE TITLE AND ESCROW, L.C.,  
Defendant**

**SUPPLEMENTAL REPORT OF MICHAEL D. THOMAS**

**HEARING EXAMINER**

**April 6, 2001**

On January 11, 2001, the Commission entered an Order of Remand in the above-captioned case, in which it affirmed the findings of the Hearing Examiner in his Report of August 18, 2000. However, the Commission remanded the case to the Office of Hearing Examiners to allow both the Bureau of Insurance (the “Bureau”) and Advantage Title and Escrow, L.C. (“Advantage Title”)<sup>1</sup> an opportunity to present any relevant evidence they might have regarding an appropriate penalty to be assessed against Advantage Title.

By Hearing Examiner’s Ruling entered on January 25, 2001, a hearing was scheduled in the Commission’s courtroom for February 22, 2001, for the purpose of receiving evidence regarding an appropriate penalty to be assessed against Advantage Title for the agency’s violation of § 6.1-2.23 C of the Code of Virginia.

By letter dated January 30, 2001, counsel for Advantage Title advised the Hearing Examiner and counsel for the Bureau that: Advantage Title had ceased operations; its corporate existence had been terminated; it has no assets; and, therefore, this matter should be rendered moot. Counsel stated he was in no position to represent a client that does not exist, and he would not be making an appearance at the scheduled hearing. Counsel further stated this matter should be removed from the Commission’s docket and dismissed as it has been rendered moot. Alternatively, counsel asked that a hearing be scheduled in Fairfax, Virginia, on his Motion to Dismiss for Want of Subject Matter Jurisdiction, prior to any hearing based on the Order of Remand.

The hearing was convened as scheduled. Scott A. White, Esquire, appeared as counsel for the Bureau. After having received notice of the hearing, Advantage Title failed to appear. Michael T. Beavers, supervisor, property and casualty agents’ investigations section, testified on behalf of the Bureau. A copy of the transcript is included with this Report.

---

<sup>1</sup> After the Commission entered its Rule to Show Cause in this case, the Defendant changed its name from Advantage Title, L.C. to Advantage Title and Escrow, L.C. The name change was effective May 26, 2000. (Tr. at 12-13).

## **SUMMARY OF THE EVIDENCE**

Mr. Beavers testified Advantage Title operated a title settlement agency. In October 1998, the Bureau received a complaint against the agency. Mr. Beavers sent one of his investigators to the agency to investigate the complaint. The investigator reviewed approximately 50 settlement files in the agency's office and found that each of the files contained an Escrow Account Disclosure (the "Disclosure Form"). The owners of the agency indicated to the investigator that the Disclosure Form was used in every settlement involving real estate located in Virginia. The Disclosure Form advised the customer that in the past Advantage Title had retained the interest earned on settlement funds as part of its settlement fee, an arrangement that had enabled it to maintain lower operating expenses and charge lower settlement fees. Advantage Title gave its customers two options. First, customers could assign to Advantage Title, as part of their settlement fee, any interest earned on their settlement funds. Second, the customers could elect to have their funds deposited into a non-interest bearing escrow account. The investigator copied the Disclosure Form, HUD 1 Settlement Statement, and the agency's Receipt/Check Disbursement Statement from five of the files she reviewed. In each instance, the customers had elected to assign to Advantage Title any interest earned on their settlement funds. (Ex. MB-1; Tr. 14-18).

Mr. Beavers further testified Advantage Title performed approximately 150 closings per month. Of this total, some involved real estate located outside of Virginia, or commercial property not subject to Virginia's Consumer Real Estate Settlement Protection Act ("CRESPA").<sup>2</sup> Mr. Beavers estimated that Advantage Title performed approximately 100 closings per month that were subject to CRESPA. (Tr. at 16-17).

Mr. Beavers explained that the Bureau's investigator obtained copies of Advantage Title's escrow account bank statements. During 1998, Advantage Title maintained two interest bearing escrow accounts. The first escrow account, Crestar Bank Checking Account 202705218, covered the period March 31, 1998, through December 30, 1998. During this period, this account earned approximately \$22,597.37 in interest. The second escrow account, Crestar Bank Checking Account 202871762, covered the period July 31, 1998, through December 30, 1998. During this period, this account earned approximately \$35,751.19 in interest. (Ex. MB-2; Tr. at 18-22).

After he reviewed the investigator's report, Mr. Beavers notified Advantage Title that the Bureau considered the agency's practice of retaining interest to be a violation of CRESPA. Mr. Beavers testified the agency continued to retain interest during 1999, and did not stop the practice until January 1, 2000. During the period January 1, 1999, through July 30, 1999, the agency maintained only its Crestar Bank Checking Account 202871762 as its escrow account. During this period, this account earned approximately \$27,000.00 in interest. The Bureau was unable to review Advantage Title's bank records for the latter half of 1999. (Ex. MB-2; Tr. at 22-24).

Mr. Beavers stated that, of the approximately \$85,000.00 in interest Advantage Title earned from April 1998, through July 1999, approximately \$64,000.00 related to real estate closings in Virginia. (Tr. at 24).

---

<sup>2</sup> Sections 6.1-2.19 through 6.1-2.29 of the Code of Virginia.

Mr. Beavers further testified the Commission's Clerk's Office cancelled Advantage Title's certificate of organization as a limited liability company effective December 31, 2000. Advantage Title elected to allow its certificate of organization to lapse rather than pursue a settlement with the Bureau. Advantage Title is still licensed as an insurance agency in Virginia. (Tr. at 25).

Mr. Beavers further testified that he is unaware of Advantage Title repaying its customers any of the interest that it retained in violation of § 6.1-2.23 C of the Code of Virginia. Finally, he stated the Bureau's recommendation that the Commission revoke Advantage Title's insurance agency license and impose a monetary penalty of approximately \$65,000.00, which he considers commensurate with the amount of interest illegally retained by Advantage Title. (Tr. at 25).

## **DISCUSSION**

The issue of whether Advantage Title violated § 6.1-2.23 C of the Code of Virginia has been decided by the Commission. Two issues need to be resolved in this proceeding; namely, how many times did Advantage Title violate the statute, and what is an appropriate penalty for such violations. Since Advantage Title failed to appear at the February 22, 2001, hearing, the issue of mitigation of any penalty need not be addressed.

The evidentiary standard that must be met in this case before a violation of the Code of Virginia may be found, and a penalty imposed, is "clear and convincing." The Virginia Supreme Court has defined this standard as:

that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.

*Gifford v. Dennis*, 230 Va. 193, 198 n.1, 335 S.E.2d 371, 373 n.1 (1985) (quoting *Walker Agcy. & Aetna Cas. Co. v. Lucas*, 215 Va. 535, 540-41, 211 S.E.2d 88, 92 (1975) (emphasis in original).

CRESPA prohibits a settlement agent in Virginia from retaining interest on settlement funds deposited in its escrow account. Specifically, Section 6.1-2.23 C of the Code of Virginia provides that:

A settlement agent may not retain any interest received on funds deposited in connection with any escrow, settlement, or closing; provided, however, that an attorney settlement agent shall maintain escrow accounts in accordance with applicable rules of the Virginia State Bar and the Supreme Court of Virginia.

The clear and unambiguous language of the statute prohibits a settlement agent from retaining any interest earned on funds deposited in its escrow account under any circumstances, including those where its customers have assigned the interest earned on their funds to the settlement agent.

The Bureau's witness testified that Advantage Title conducted approximately 100 residential real estate closings per month that were covered by CRESPA, and that these closings resulted in Advantage Title earning approximately \$85,000.00 in interest income from its escrow account over the period of 15 months. The evidence was undisputed. This evidence in and of itself does not establish with any certainty the number of instances that Advantage Title violated § 6.1-2.23 of the Code of Virginia. Although this evidence makes it more likely than not that Advantage Title retained the interest earned on its escrow account, it does meet the clear and convincing standard of proof necessary to find a violation of § 6.1-2.23 of the Code of Virginia. The Bureau, however, introduced into evidence five Disclosure Forms executed by Advantage Title's customers. The Disclosure Forms, along with their associated HUD 1 Settlement Statements and Receipt/Check Disbursement Statements, do establish by clear and convincing evidence that on five occasions Advantage Title violated § 6.1-2.23 of the Code of Virginia.

For violations of CRESPA, Section 6.1-2.27 of the Code of Virginia sets forth the penalties the Commission may impose. The statute provides, in part, that:

If the appropriate licensing authority determines that the settlement agent licensed by it or any of its other licensees has violated this chapter, or any regulation or order promulgated thereunder, after notice and opportunity to be heard, the appropriate licensing authority may order one or more of the following:

1. A penalty not exceeding \$5,000 for each violation;
2. Revocation or suspension of the applicable licenses; and
3. Restitution to be made by the person violating this chapter in the amount of any actual, direct financial loss.

In this instance, the maximum monetary penalty for each violation is warranted. Advantage Title retained the interest earned on its escrow account from March 1998 through December 1999, which according to the evidence in this case would have amounted to approximately \$90,000.00 for the period. Moreover, Advantage Title continued to retain the interest earned on its escrow account even after being advised by the Bureau that the practice was a violation of CRESPA. Rather than face the possibility of a Commission penalty, Advantage Title's members closed the agency's doors and transferred or liquidated the agency's assets. The members of Advantage Title, a limited liability company, have profited from the agency's illegal activity. Advantage Title made no attempt to refund to its customers the interest income it earned on its escrow account, nor did the agency use the interest income for a civic or charitable purpose.<sup>3</sup> For these reasons, the Commission should impose the maximum monetary penalty permitted by law, and further, the

---

<sup>3</sup> It should be noted that § 6.1-2.23 of the Code of Virginia prohibits a settlement agent from "retain[ing]" the interest earned on funds deposited in its escrow account. It does not prohibit a settlement agent from "earning" interest on its escrow account. In fact, by using the word "retain" it appears the General Assembly contemplated that a settlement agent could earn interest on its escrow account, but that it could not keep the interest. In other words, the settlement agent may not profit from the use of customer funds. If a settlement agent maintains an interest-bearing escrow account, it would either have to refund to its customers the interest earned on their settlement funds, or, as lawyers are required to do, it could meet the requirements of the statute by "donating" the interest earned on its escrow account for some civic or charitable purpose. In the latter example, the settlement agent clearly has not "retained" the interest earned on its escrow account, or profited from the use of such funds.

Commission should revoke Advantage Title's license to transact the business of insurance in the Commonwealth of Virginia.

### **FINDINGS AND RECOMMENDATIONS**

For the reasons set forth above, I find by clear and convincing evidence that Advantage Title violated § 6.1-2.23 C of the Code of Virginia on five occasions. Accordingly, **I RECOMMEND** the Commission enter a Judgment Order that:

1. ***PENALIZES*** Advantage Title the sum of five thousand dollars (\$5,000.00) for each of the company's five violations of § 6.1-2.23 C of the Code of Virginia, for a total penalty of twenty-five thousand dollars (\$25,000.00); and

2. ***REVOKES*** Advantage Title's license to transact the business of a title insurance agency in the Commonwealth of Virginia.

### **COMMENTS**

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

---

Michael D. Thomas  
Hearing Examiner